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BIPARTISAN COMMISSION CONCLUDES U.S. ANTITRUST LAWS ARE SOUND

Commission Recommends Legislation, Other Actions to Improve the Law

April 3, 2007—The twelve-member, bipartisan Antitrust Modernization Commission (AMC) today released its Report and Recommendations to the President and Congress. The Commission was established by the Antitrust Modernization Commission Act of 2002 to study the U.S. antitrust laws and determine whether they should be modernized. After a comprehensive, three-year review, the Commission has concluded that the state of U.S. antitrust enforcement is fundamentally “sound.” The laws as enacted and enforced are sufficiently flexible to account for the changing global economy and better understanding of how markets operate. Nevertheless, the Commission makes several recommendations to improve U.S. antitrust enforcement, including several proposals for legislative change.

In a letter to the President and Congress accompanying the Report, the Commission’s Chair, Deborah A. Garza, and Vice-Chair, Jonathan R. Yarowsky, praised “a truly bipartisan effort” that resulted in “a remarkable degree of consensus on a number of important principles and recommendations.” They describe the Report as “fundamentally an endorsement of [the] free-market principles . . . [that] have driven the success of the U.S. economy and will continue to fuel” essential investment and innovation. “Free trade, unfettered by either private or governmental restraints, promotes the most efficient allocation of resources and greatest consumer welfare,” they said.

Among other things, the Commission has recommended:

- ***Repeal of the 1930s-era pricing legislation.*** The Robinson-Patman Act, enacted in 1936, requires sellers to charge the same price to all buyers except in certain circumstances. Commissions since 1955 have recommended substantial revision or repeal of the Act on the grounds that it discourages price discounting and appears to be ineffective in protecting the small businesses that were intended to be its beneficiaries. The Commission recommends that the Act finally be repealed, concluding that anticompetitive price discrimination is already prevented by other antitrust laws.
- ***Legislation overruling two Supreme Court decisions to allow both direct and indirect purchasers of price-fixed goods to sue in federal court.*** As a result of two Supreme Court cases decided in 1967 and 1977, only direct purchasers can sue for damages in federal court, even where they have passed on overcharges to their customers. Indirect purchasers can sue under state law in 36 states plus the District of Columbia. These different federal and state rules have resulted in a morass of litigation that takes money out of the pockets of injured consumers. In addition, in some cases, the uninjured recover, while the injured do not. The Commission's proposal ensures that all injured parties can sue to recover their damages, regardless of where they reside. It would also provide for the consolidation of all suits related to the same conspiracy in a single federal forum.
- ***Improvements to federal merger review.*** Mergers above a certain size must be reported to the Federal Trade Commission (FTC) and U.S. Justice Department (DOJ) for review. The Commission recommends legislation that would eliminate unnecessary regulatory delay caused by uncertainty over which agency will review a transaction by amending the Hart-Scott-Rodino Act to require clearance to occur within a specified short period of time. The Commission also recommends that mergers be treated the same regardless of which agency reviews them. In addition, the Commission makes a number of recommendations designed to reduce the burden of merger review and increase the transparency of merger enforcement policy. It recommends that substantial weight be given to efficiencies in merger review, including those relating to achieving innovation.
- ***Increased cooperation and comity in international antitrust.*** Today, antitrust enforcement exists worldwide. This has increased the risk of inconsistent standards and conflicting enforcement. The Commission makes a number of recommendations to minimize these risks and reduce the burden on companies subject to merger review in several countries. The Commission recommends that the United States enter into cooperation and comity agreements with more of its major trading partners. These agreements would include provisions designed to help reduce conflict in antitrust enforcement as well as to strengthen cooperation in the fight against international price-fixing cartels. The Commission also recommends that the FTC and DOJ report to Congress on the feasibility of adopting a merger notification multinational "clearing house" that would reduce the burden on merging companies.

- ***Disfavor statutory immunity from the antitrust laws.*** Noting that Congress is currently considering the repeal of several immunities (including those for the business of insurance and ocean liner shipping conferences), the Commission explains that statutory immunities should be granted rarely (if ever) and then only on the basis of compelling evidence that either (1) competition cannot achieve important societal goals that trump consumer welfare, or (2) a market failure clearly requires government regulation in place of competition. The Commission recommends a framework for Congress's review of existing or proposed immunities from antitrust law.

According to Garza and Yarowsky, "The issues the Commission examined are complex. Reasonable minds can, and likely will, differ on many of the Commission's findings and recommendations. But we hope this Report will prompt an important national conversation on those recommendations that will result in the adoption of many, if not all, of them."

A more complete summary of the Commission's recommendations is contained in the Commission's letter to the President and Congress, which is posted at www.amc.gov, along with the Commission's full Report.

The Commission was created by Congress and began its work in April 2004. In addition to the Chair and Vice-Chair, members of the Commission are: Bobby R. Burchfield, W. Stephen Cannon, Dennis W. Carlton, Makan Delrahim, Jonathan M. Jacobson, Donald G. Kempf, Jr., Sanford M. Litvack, John H. Shenefield, Debra A. Valentine, and John L. Warden.